IP 03-1376-C Y/L Hecking v Cohen
Judge Richard L. Young Signed on 1/12/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAPTAIN DIRCK HECKING,	)	
	)	
Plaintiff,	)	
	)	**1:03-CV-1376-RLY-WTL**
vs.	)	
	)	
JONATHAN COHEN, Director of Legal Department AIR LINE PILOTS ASSOCIATION; IFALPA - LOSS OF LICENSE PLAN; and ASSOCIATION WELFARE BENEFIT PLAN,	)	
	)	
Defendant.	)	

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ENTRY ON MOTION FOR SUMMARY JUDGMENT

Plaintiff, Captain Dirck Hecking, is a pilot. He was flying for Eastern Airlines ("EAL") in 1989 when a machinist strike effected the airline. As a member of the pilots' union, the Airline Pilots Association ("ALPA"), Hecking and other pilots honored the picket lines of the machinists. However, with the encouragement and blessing of the members of ALPA's Observation and Tracking Committee and other union officials, Hecking returned to work as a pilot for EAL prior to the end of the machinist strike in order to act as a "mole" inside EAL and report back information which might be valuable to ALPA. In order to return to work, EAL required him to resign from ALPA and provided him with a letter of resignation which he submitted to ALPA. The requirement of a resignation from the union was known ahead of time by Hecking and the union officials, so an understanding was reached that Hecking's resignation would be received and acknowledged by the union for purposes of reporting to EAL but

otherwise treated as bogus.

According to the many affidavits supplied by Hecking, during the course of the strike he reported back to the union on important "inside information" and forwarded photos and copies of documents. He received payment from a union official during the time period immediately following his return to work at EAL in order to sustain his family until he actually received income from flying. In February of 1990 he was terminated by EAL. Following the conclusion of the strike, he was allowed to attend the functions of union sub-groups whose membership was limited to those who did not cross the picket line. In short, as far as Hecking could tell, and consistent with the arrangement as he understood it, he was treated by the union and its membership as though he had never resigned.

On September 2, 1992, Hecking wrote to ALPA and requested that he be issued a membership card showing him as "current". On September 11, 1992 ALPA responded by letter, indicating that Hecking was not eligible to receive a "current active card" because of his resignation in August of 1989. Hecking claims he never received the letter. He was not employed as a pilot by any employer whose pilots were represented by ALPA and made no other effort to obtain an active membership card until he was hired by Pan American Airline ("Pan Am") in 2001.

On September 24, 2001, Hecking was hired as a pilot by Pan Am. He signed an application for ALPA membership on October 2, 2001. On October 7, 2001, Hecking became disabled as a result of a condition known as labrynthitis and therefore lost his license to fly. Hecking's application to the union was approved on October 15, 2001, and ALPA sent him a letter dated October 26, 2001, welcoming him to the union as an "apprentice member," noting that his coverage under ALPA sponsored benefit programs would begin the first day of the

following month, or November 1, 2001. On May 10, 2002, Hecking filed preliminary notice of claim forms with ALPA, seeking benefits under the Air Line Pilots Association - IFALPA Aircrew Loss of License Plan ("Loss of License Plan")and the Air Line Pilots Association Welfare Benefit Plan ("Welfare Benefit Plan").

ALPA is the plan administrator for both of the benefit plans from which Hecking seeks disability benefits. Each of the plans rejected Hecking's claim for the same reason: Hecking's disability predated the November 1, 2001 effective date of his coverage. Hecking pursued an appeal of the denial of benefits unsuccessfully. He then filed this action *pro se* against the two plans, ALPA and Jonathon Cohen, the Director of ALPA's legal department. After obtaining counsel and voluntarily dismissing Cohen and ALPA, Hecking filed an Amended Complaint advancing claims against the two plans which remain the only defendants in this action.

The Amended Complaint is set forth in three counts. Count I asserts that Hecking qualified as a "reactivated member" instead of an "apprentice member" of ALPA when he was hired by Pan Am and that the plans have waived, and are estopped from asserting, his lack of active membership in ALPA at the time he was terminated by EAL as a basis for determining that he did not qualify for benefits. Count II asserts a breach of contract against both plans. The final count, Count III, alleges constructive fraud on the part of the plans. It asserts that ALPA acted as an agent of the plans when its officials verbally agreed not to treat his resignation as effective and that he relied upon their representation of continued good standing as a member.

The defendant plans have filed a motion for summary judgment. They argue that to the extent Hecking's claims are based on state law, they are preempted by the Employment Retirement Income Security Act of 1974 ("ERISA") and he is limited to an action under Section 502(a) of the Act, 29 U.S.C. § 1132(a)(1)(B). They go on to argue that under the express terms

of the plans, coverage is unavailable to Hecking and that to the extent common law developed under ERISA recognizes estoppel, he is unable to establish the requisite elements. Hecking fires back by asserting that there remains a material question of fact with regard to whether or not ALPA was an agent of the plans when union officials agreed to treat his 1989 resignation as bogus. In agreement that ERISA is applicable to the plans, but never really addressing the issue of preemption,

Hecking simply maintains that because his resignation was bogus, he should have been accorded reactivated member status and benefits under the plans.

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding whether a genuine issue of material fact exists, the court construes all facts in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A party moving for summary judgment on a claim on which the nonmovant party bears the burden of proof at trial may discharge its burden by showing, "that is, pointing out" an absence of evidence to support the nonmovant's case. *Id.* at 325.

The review of a denial of benefits by a plan administrator carries its own substantive

standard of review. When an employee benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, the court reviews a denial of benefits under an arbitrary and capricious standard. *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001). Here, Section 6.1 of each plan provides the plan administrator with the authority to determine eligibility, construe the plan terms and answer all questions arising out of the plan's administration. This discretionary authority is more than sufficient to invoke the arbitrary and capricious standard of review. Therefore, the administrator's decision will not be overturned if: 1) based on the evidence before the administrator there is a reasoned explanation for the outcome, 2) the decision is based upon a reasonable explanation of plan documents, and 3) the administrator has based its decision on an examination of the relevant factors that make up the core aspects of the issue. *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, 360 F.3d 681, 686 (7th Cir. 2004).

ANALYSIS

1. Preemption

Defendants are correct in maintaining that any state law theories of recovery aimed at recovering benefits pursuant to the plans are preempted by Section 502(a) of ERISA. *Aetna Health Inc. v. Davila*, __ U.S. __, 124 S.Ct. 2488 (2004); *Klassy v. Physicians Plus Insurance Company*, 371 F.3d 952, 955 (7th Cir. 2004). That does not necessarily mean that the legal principles inherent in a state common law estoppel or constructive fraud claim are unavailable to the plaintiff. In enforcing ERISA, courts have drawn upon the common law to fill in any substantive gaps, including recognition of estoppel principles and the prohibition of fraud with respect to plans. *See, Beach v. Commonwealth Edison Co.*, 382 F.3d 656, 659 (7th Cir.

2004)("Doubtless federal common law prohibits fraud with respect to pension and welfare benefits, apart from any need to invoke ERISA's fiduciary duty."); *Vallone v. CNA Financial Corp.*, 375 F.3d 623, 629-630 (7th Cir. 2004)(recognizing that an estoppel claim may be made under ERISA in addition to a claim for review of the denial of coverage). However, a common law breach of contract claim is completely subsumed by Section 502(a). *Davila*, 124 S.Ct. at 2491.

2. *Denial of Coverage*

As the defendants point out in their reply brief, Hecking never directly challenges the decision to deny benefits as being contrary to plan language. In essence he seems to concede that if he were an apprentice member disability coverage would not have attached until November 1, 2001. The plans go on to reiterate in their reply that Hecking was clearly an apprentice member, as that term is defined in the plans, because he had previously resigned union membership prior to being terminated by EAL, which was the last employer of union pilots for which Hecking flew prior to being hired by Pan Am. Reactivated members, under the plan, are pilots who were active members of ALPA when they were last terminated by a union employer.

However, what escapes the court is how Hecking's status as a reactivated member would change anything. Hecking argues strenuously and presents evidence which might support a determination that ALPA breached an agreement it had to treat his resignation as a non-event and, therefore, his termination from EAL in February of 1990 came at a time when he remained an active member.[1] While this could support an argument that Hecking should be considered a

[1]By stating that Hecking has presented evidence that "might support" his contention that he was an ALPA member at the time he was terminated by EAL the court is by no means

reactivated member, the distinction appears to be one without a difference under these circumstances. As noted by the defendants in their opening brief, Section 4.1 of the Loss of License Plan and Section 4.2 of the Welfare Benefit Plan read as follows:

> An Apprentice Member, Active Member, Executive Member, Inactive Participant and Reactivated Member shall become a Participant under the Plan (*the Welfare Benefit Plan reads "under Section 4.2 of the Plan")* as of the later of (a) the Effective Date of the Plan, or (b) the first day of the month following the date such member's application and Proof of Good Health has been accepted and approved by the Plan Administrator.

It is uncontested that the "Effective Date" for both plans is January 1, 1998, and the first day of the month referenced in subsection (b) would be November 1, 2001, leaving November 1, 2001, as the date that an apprentice member or a reactivated member would be eligible to become a participant under the plan.[2]

Despite the lack of any apparent difference in the eligibility date for coverage, Hecking argues that he should be considered a reactivated member as opposed to an apprentice member.

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suggesting that it has fully considered or weighed the evidence on that issue.

[2]It should be pointed out that there appears to be two different disability coverages under the Welfare Benefit Plan, a company paid coverage and a contributory coverage. Section 4.2 speaks to eligibility requirements for the contributory plan. Section 4.1 sets the eligibility requirements for the company paid coverage, but makes no mention of apprentice members, reactivated members or any other distinctive membership status; rather, it refers to "All Pilots on the Pilots system seniority list" as being eligible on either (a) the effective date of the plan or (b) the first date of the month following the month in which the pilot is hired. However, plaintiff has not indicated whether or not he believes he is entitled to company paid coverage and the argument in his brief is based solely on the issue of whether or not he should be considered a reactivated member because of his bogus resignation. Such an argument would have no bearing on whether or not he qualified for coverage under the company paid program, so the court has presumed that such coverage is not at issue. Both parties have ignored the fact that the plan provides for distinct company paid coverage, which may be because Hecking became disabled before he actually had a chance to fly for Pan Am and a premium may never have been paid by the company. In any event, neither party has distinguished the company coverage, despite the difference in eligibility language, so the court will not attempt to do so.

In plaintiff's brief, after he quotes the definition of reactivated member, the following statement is made:

> Under these identical definitions of "REACTIVATED MEMBERS" in both Plans the plaintiff, not having really resigned from ALPA, was clearly a "Reactivated Member" at the time of occurrence of his disability and therefore did not have to wait until November 1, following his disability to become eligible for benefits under the Plans.

Never once does Hecking cite or refer to any language in either plan which distinguishes between an apprentice member and a reactivated member with regard to coverage eligibility. Nor does the court find such differentiation in its review of the plan.

Since there is no distinction made by the plans, with respect to eligibility of apprentice and reactivated members, November 1, 2001, is Hecking's effective date of coverage. Pursuant to the "Definitions" section of both plans, a covered "Disability" does not include:

> (e) any disability due to an injury or sickness which commences within the first two years after the effective date of the Participant's coverage if such disability is caused or contributed to by an injury, sickness or condition in existence prior to the effective date of initial or increased coverage.

Accordingly, because the sickness or condition disabling him began prior to the effective date of his coverage, pursuant to the plain language of the plan, Hecking's claim was properly denied.

3. *Estoppel or Fraud*

Plaintiff's theories of estoppel and fraud are both premised upon ALPA being an agent of the plans, and subject to fiduciary duties, when it agreed not to recognize Hecking's resignation. One immediate problem with this line of argument is the fact that both of the current plans became effective in January of 1998, almost ten years after the sham resignation. Though there is no record of what type of plans, if any, may have preceded the current plans or whether ALPA was the administrator of those plans, it can certainly be said that, with respect to the law of

agency, actions which precede the existence of the principal cannot be attributed to the principal without some type of adoption or ratification. There is no evidence of that here.

Similarly, ALPA's fiduciary responsibilities as a plan administrator exist with respect to its actions in administering the plans. *Herdrich v. Pegram*, 170 F.3d 683, 685 (7th Cir. 1999). The representations made by union officials in 1989 with regard to Hecking's union membership status were not made in connection with the administration of the plans. Rather, those representations were made in conjunction with union business, if spying can be called union business. Further, the representations were not made in writing, a prerequisite to claiming estoppel under federal ERISA common law unless such representations are with regard to plan meaning. *Vallone,* 375 F.3d at 639.

Finally, as indicated previously, Hecking's continued union membership is irrelevant to the issue of whether or not he was entitled to benefits. Even if Hecking had been an active member in good standing at the time EAL terminated his employment, when he was hired by Pan Am neither reactivated members nor apprentice members qualified as participants in the disability plans until the first day of the month following their submission of an application to ALPA. Accordingly, summary judgment in favor of the defendants is appropriate.

IT IS SO ORDERED this ___ day of January 2005.

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RICHARD L. YOUNG, JUDGE
United States District Court

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